

A Hong Leong Bank Bhd v Phung Tze Thiam John Phung

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-04-279
OF 2006

B JAMES FOONG, RAUS SHARIF AND ABDULL HAMID EMBONG
JJCA
5 FEBRUARY 2008

C *Labour Law — Constructive dismissal — Demotion — Whether demotion, redesignation and transfer can be constituted as dismissal — Consideration or test for constructive dismissal*

D *Labour Law — Employment — Contract of employment — Whether employee should be given opportunity to correct his weakness before disciplinary action is taken — Whether employer had breached terms of contract of employment*

E *Labour Law — Reinstatement — Factors to be considered — Lack of mutual trust and confidence — Whether proper case for reinstatement*

F The respondent commenced his employment with the appellant as a branch manager in the appellant's branch in Tawau. Pursuant to a domestic inquiry, the respondent was found guilty of several charges framed against him. Consequently, the appellant demoted the respondent and he was redesignated and transferred to the appellant's head office in Kuala Lumpur as a manager.

G The respondent claimed against the appellant in Industrial Court for constructive dismissal. The Industrial Court ruled that the respondent was constructively dismissed by the appellant and awarded the respondent back wages as well as compensation in lieu of reinstatement. The appellant applied for judicial review to quash the entire award and the respondent applied for judicial review on, inter alia, the failure of the Industrial Court to reinstate him. The High Court dismissed the appellant's application but allowed the respondent's application and ordered the respondent to be reinstated to his former post as the manager of the Tawau Branch. The appellant appealed to the Court of Appeal.

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Held, allowing the appeal in part:

(1) In considering whether there was a constructive dismissal, the

consideration was not whether there was any domestic inquiry but whether the employer was guilty of a breach of the contract of service going to the root of the contract or whether he had evinced an intention to no longer be bound by the contract (see para 14).

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- (2) Section 12.4.3 of the Personnel Policies & Regulations for Executive Termination of Service, applicable to the respondent, provides that 'unless it is a severe offence amounting to dishonesty or immorality, an employee shall be given an opportunity to correct his weakness before disciplinary action is taken against him'. But the respondent was not given such opportunity (see para 15).

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- (3) The punishment meted out reflects that the appellant did not consider the offences as severe amounting to dishonesty or immorality. Otherwise, the appellant would have imposed a more severe punishment such as terminating the respondent's service. Thus, the appellant, by failing to provide prior counseling to the respondent before imposing the punishment of demotion, redesignation and transfer had breached the terms of the contract of employment with the respondent. The breach is a fundamental breach that goes to the root of the contract (see para 15).

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- (4) The respondent held a reasonable high ranking position. He was the head of the appellant's branch in Tawau. On the facts of this case, mutual trust and confidence was lacking between the parties. There was no useful purpose, for reason of industrial harmony to thrust the respondent upon the appellant. More so in this case, the respondent had left the services of the appellant for five and a half years when the order of reinstatement was made by the High Court. Taking into account all the facts and circumstances of the case, the proper remedy in this case is compensation in lieu of reinstatement as ordered by the Industrial Court (see para 20).

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[Bahasa Malaysia summary]

Responden memulakan pekerjaannya dengan perayu sebagai pengurus cawangan di cawangan perayu di Tawau. Berikutan daripada siasatan dalaman, responden telah didapati bersalah atas beberapa pertuduhan ke atasnya. Seterusnya, perayu menurunkan pangkat responden dan beliau telah dialih tugas dan dihantar ke ibu pejabat perayu di Kuala Lumpur sebagai pengurus. Responden membuat tuntutan terhadap perayu di Mahkamah Perusahaan untuk pembuangan konstruktif. Mahkamah Perusahaan memutuskan bahawa responden telah dibuang kerja secara konstruktif oleh perayu dan memberi award bayaran tertunggak termasuk pampasan sebagai ganti pengembalian kedudukan jawatan. Perayu memohon untuk semakan semula kehakiman untuk membatalkan keseluruhan award

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- A dan responden memohon untuk semakan semula kehakiman ke atas, antara lain, kegagalan Mahkamah Perusahaan untuk mengembalikan jawatannya. Mahkamah Tinggi menolak permohonan perayu tetapi membenarkan permohonan responden dan memerintahkan responden dikembalikan jawatannya kepada jawatan dahulunya sebagai pengurus cawangan Tawau.
- B Perayu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan sebahagian rayuan:

- C (1) Dalam mempertimbangkan sama ada terdapat pembuangan kerja konstruktif, pertimbangan itu bukanlah sama ada siasatan dalaman dijalankan tetapi sama ada majikan bersalah terhadap pelanggaran kontrak dengan meneliti akar umbi kontrak tersebut atau sama ada
- D beliau telah memperlihatkan keinginan untuk tidak diikat oleh kontrak itu lagi (lihat perenggan 14).
- E (2) Seksyen 12.4.3 Polisi Personel dan Peraturan untuk Penamatan Perkhidmatan Eksekutif dapat digunapakai oleh responden, dengan syarat 'kecuali ia adalah kesalahan teruk yang melibatkan ketidakjujuran dan tidak bermoral, seorang pekerja harus diberi peluang untuk membetulkan kelemahannya sebelum tindakan disiplin diambil terhadapnya'. Namun responden tidak diberi peluang tersebut (lihat perenggan 15).
- F (3) Hukuman yang dijatuhkan menunjukkan perayu tidak menganggap kesalahan tersebut berat yang membentuk ketidakjujuran atau tidak bermoral. Jika tidak, perayu mungkin akan mengenakan hukuman yang lebih berat seperti menamatkan perkhidmatan responden. Oleh itu, perayu dengan kegagalannya memberikan kaunseling terdahulu kepada responden sebelum menjatuhkan hukuman berbentuk penurunan pangkat, pelantikan semula dan pertukarannya, perayu telah melanggar terma-terma kontrak pekerjaan dengan responden. Pelanggaran itu adalah pelanggaran utama yang menjejaskan asas kontrak tersebut (lihat perenggan 15).
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- H (4) Responden menjawab jawatan yang agak tinggi kedudukannya. Beliau merupakan ketua kepada cawangan perayu di Tawau. Berpandukan fakta kes ini, kepercayaan bersama dan keyakinan adalah kurang di antara pihak terbabit. Tidak ada sebab berguna, atas sebab
- I harmoni industri untuk memaksa responden ke atas perayu. Lebih-lebih lagi dalam kes ini, responden telah meninggalkan perkhidmatan dengan perayu selama lima setengah tahun apabila perintah untuk pengembalian jawatan dilakukan oleh Mahkamah Tinggi. Dengan mengambilkira semua fakta dan keadaan kes,

pemulihan yang sebetulnya dalam kes ini adalah pengembalian jawatan seperti yang diperintahkan oleh Mahkamah Perusahaan (lihat perenggan 20).]

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Notes

For cases on contract of employment, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 862–886.

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For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.

For cases on reinstatement, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1072–1079.

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Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750 (refd)

Ang Beng Teik v Pan Global Textile Bhd [1996] 3 MLJ 137 (folld)

Hong Leong Equipment Sdn Bhd v Liew Fook Chua and another appeal [1996] 1 MLJ 481 (refd)

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JT International v Lau Thow Sin [2006] 4 MLJ 251 (folld)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (refd)

Milan Auto Sdn Bhd v Wong See Yen [1995] 3 MLJ 537 (refd)

E

Minolta Malaysia Sdn Bhd v Ng Siew Pheng [1990] 3 AMR 3421 (not folld)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1998] 1 MLJ 92 (refd)

Wong Yuen Hock v Hong Leong Assurance Sdn Bhd & Anor [1995] 2 MLJ 753 (refd)

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Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Judicial Review No K25–15 of 2005 (High Court, Kota Kinabalu)

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N Sivabalah (Norbert Yapp with him) (Jayasuriya Kah & Co) for the appellant. Govinda Raj (Raj & Co) for the respondent.

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Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court at Kota Kinabalu given on 27 January in respect of two applications for judicial review No K25–15 of 2005 and K25–16 of 2005. Case No K–25–15 of 2005 is the application by Phung Tze Thiam @ John Phung ('the respondent'). He sought an order to quash part of the Industrial Court Award No 1000 of 2005 dated 18 May 2005 ('award') in respect of some findings made by the

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A Industrial Court. Case No 25–16–2005 on the other hand, is an application by Hong Leong Bank Bhd ('the appellant') seeking to quash the entire award.

[2] The facts leading to the two applications for judicial review are these. The respondent commenced his employment with the appellant as a branch manager on 15 March 1999 on Executive Grade M3. He was in charge of the appellant's branch in Tawau. On 25 April 2000, the appellant received a letter from Bank Negara Malaysia instructing it to conduct an investigation into an allegation made against the respondent which was triggered by an anonymous letter dated 8 April 2000.

[3] The necessary investigations were carried out and pursuant to the same, the appellant issued a notice of inquiry dated 29 July 2000 to the respondent wherein seven charges were preferred against him. The charges read:

D Charge 1

That you as the Branch Manager of Tawau Branch:

- E • had engaged and/or concerned yourself and/or had an interest in the business of the Bank's customers namely, Teras Fajar Sdn Bhd ('Teras Fajar'), Jet Car Motor Sdn Bhd ('Jet Car'), Mr Pang Pah Loh and Mr Fung Kar Hung (hereinafter collectively referred as 'the Customers'); and/or
- F • were involved as a manager or agent in the business of the Bank's Customers; and/or
- were involved in the operation and/or assisted in the management of the accounts of the Customers,

G and you had thereby breached your terms and conditions of employment by putting yourself in a position of conflict of interest in breach of Bank Negara Malaysia's ('BNM') Code of Ethics (BNM/GP7) and the terms and conditions of your employment which requires you to maintain a standard of conduct which is beyond reproach and to strictly comply with BNM's Code of Ethics at all times.

H Charge 2

That you as the Branch Manager of Tawau Branch:

- I • had engaged and/or concerned yourself and/or had an interest in the business of the Bank's customers namely, Teras Fajar Sdn Bhd ('Teras Fajar'), Jet Car Motor Sdn Bhd ('Jet Car'), Mr Pang Pah Loh and Mr Fung Kar Hung (hereinafter collectively referred as 'the Customers'); and/or,

- were involved as a manager or agent in the business of the Bank's Customers; and/or A
- were involved in the operation and/or assisted in the management of the accounts of the Customers

and you had thereby breached your terms and conditions of employment which requires you to devote your whole time, attention, energies and skill solely to the business of the Bank and that you shall not be concerned or interested directly or indirectly in any business or work other than that of the Bank. B

Charge 3 C

That you as the Branch Manager of Tawau Branch having:

- engaged and/or concerned yourself and/or had an interest in the business of the Bank's customer namely, Teras Fajar Sdn Bhd ('Teras Fajar'); and/or D
- involved yourself as a manager or agent in the business of the Teras Fajar; and/or E
- involved yourself in the operation and/or assisted in the management of the accounts of Teras Fajar,

had failed to declare or disclose your interest to the Bank but instead had recommended and/or submitted the following applications for credit facilities/ad hoc facilities to be granted by the Bank to Teras Fajar: F

- On 25 May 1999 you had recommended combined facilities of RM900,000 for Teras Fajar, which was approved by the Bank up to RM200,000 for FBEP (AP) facility; G
- On 20 March 2000 you had performed an early renewal of the Teras Fajar's facility and recommended a term loan of RM500,000 which was rejected by the Bank
- Between May and December 1999 you had submitted and/or recommended approval for 16 ad hoc requests by Teras Fajar involving RM826,100 for OD/FBEP(AP)/LC excesses. H

and you have thereby put yourself in a position of conflict of interest and breached Bank Negara Malaysia's Code of Ethics (BNM/GP7) which you are required under your terms and conditions of employment to strictly comply with at all times. I

A Charge 4

B That you as the Branch manager of Tawau Branch assisted and/or were involved in an arrangement which facilitated a non-Bumiputra, namely Pang Pah Loh to control Teras Fajar Sdn Bhd, a company with 100% Bumiputra shareholding and you had thereby facilitated activities in contravention of national development policies in breach of BNM's Code of Ethics (BNM/GP7) and the terms and conditions of your employment which requires you to maintain a standard of conduct which is beyond reproach and to strictly comply with BNM's Code of Ethics at all times.

C Charge 5

D That on or about 26 February 2000, you as the Branch Manager of Tawau Branch did direct the branch officers, Yung Dai Dai and Awang Dzulkifli to debit a customer, Mr Pang Pah Loh's personal account to cover any future excesses in the current accounts of two other customers of the Bank namely Teras Fajar Sdn Bhd and Jet Car Motor Sdn Bhd without having first received from Mr Pang Pah Loh his standing instructions or fund transfer request form in writing authorising such transactions and you had thereby exposed the Bank to risk of potential claims by Mr Pang Pah Loh for conversion of his funds.

E Charge 6

F That between September 1999 to May 2000 you as the Branch Manager of Tawau Branch did personally approve and/or directed the branch staff to approve fund transfer between the Bank's customers namely, Teras Fajar Sdn Bhd, Jet Car Motor Sdn Bhd and Mr Pang Pah Loh prior to receipt of the fund transfer request form signed by the respective transferors and you had thereby exposed the Bank to risk of potential claims by the transferors for conversion of their funds.

G Charge 7

H That you as the Branch Manager of Tawau Branch had failed to exercise due care in the discharge of your duties as branch manager in that you had neglected to obtain the written confirmation from the directors of Teras Fajar Sdn Bhd ('Teras Fajar') that the transfer of Teras Fajar's FBEP(AP) proceeds amounting to RM1,700,000 over a period of eight months from September 1999 to May 2000, from the account of Teras Fajar into the personal account of Mr. Pang Pah Loh (who was neither a director nor a shareholder of Teras Fajar) was proper.

I [4] The domestic inquiry against the respondent was held on 8 and 9 August 2000. The respondent was found guilty of charges No 1 (bullet point 3), 5, 6 and 7 and not guilty of the remaining charges.

[5] By a letter dated 30 August 2000, the appellant demoted the respondent from Executive Grade M3 to Executive Grade M4 with effect from 11 September 2000. He was redesignated and transferred to the appellant's head office in Kuala Lumpur as Manager, Remedial Management Department at the same salary as before but without the branch manager's allowance.

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[6] The respondent by a letter dated 6 September 2000 denied that he was guilty of any of the charges and stated that he did not agree nor acquiesce to the decision of the appellant to discipline, demote, redesignate and transfer him to Kuala Lumpur. He thus requested the appellant to withdraw its letter of 30 August 2000 and the punishment imposed on him before 11 September 2000 failing which he would have no alternative but to consider himself having been dismissed from the service of the appellant without just cause or excuse. The appellant by a letter dated 7 September 2000 refused to accede to the respondent's request.

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[7] The respondent then by a letter dated 11 September 2000 considered himself dismissed by the appellant without just cause or excuse with immediate effect. He then filed a complaint under s 20 of the Industrial Relation Act 1967 against the appellant. The matter was referred to the Industrial Court.

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[8] On 18 May 2005, the Industrial Court ruled that the respondent was constructively dismissed by the appellant without just cause or excuse and awarded the respondent the following remedies:

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- (i) Backwages from the date of dismissal (11 September 2000) to the last date of hearing (11 June 2004) but limited to 24 months:

$$\text{RM}7,300 \times 24 \times 75/100 = \text{RM}131,400$$

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- (ii) Compensation in lieu of reinstatement (1 month's salary for every completed year of service ie from 15 March 1999 to 11 September 2000):

$$\text{RM}7,300 \times 1 = \text{RM}7,300$$

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[9] Aggrieved, the appellant applied for judicial review to quash the entire award of the Industrial Court. The respondent too, applied for judicial review against the decision of the Industrial Court on two aspects:

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- (a) the Industrial Court had failed to reinstate him; and

A (b) the Industrial Court had concluded that he was to some limited extent blameworthy or responsible with regard to effecting the transfer of fund before the customer had signed the fund transfer form.

B [10] Both the applications for judicial review were consolidated and heard together by the High Court. On 27 January 2006, the learned High Court judge in his judgment dismissed the appellant's application. However, he allowed the respondent's application and ordered the respondent to be reinstated to his former post as manager of the Tawau Branch of the appellant without loss of service, salary, allowance, privileges and benefits. Hence, this appeal by the appellant.

C [11] Before us, it was submitted on behalf of the appellant that the respondent had no valid reasons to claim that he had been constructively dismissed by the appellant. Alternatively, it was argued that the learned High Court judge had erred in law in making the order for reinstatement.

(i) *Constructive dismissal*

E [12] It was contended by the appellant before the High Court as well as before us that the respondent was not constructively dismissed, only a demotion of rank following a domestic inquiry; this cannot be constituted as dismissal. The appellant relied on *Minolta Malaysia Sdn Bhd v Ng Siew Pheng* [1990] 3 AMR 3421 where Azmel J (as he then was) ruled:

F If the domestic tribunal has the authority to impose an order of dismissal against an employee, it would be ridiculous to allege that by deciding to impose an order of demotion in rank, such order can amount to constitute dismissal because if the domestic tribunal really wishes to dismiss the employee it has the authority to do so and there is no need for the domestic tribunal to disguise its decision by making an order of demotion in rank.

G [13] However, the learned High Court judge was of a different view. He addressed the issue and concluded in the following words:

H If a demotion following a domestic inquiry would prevent a constructive dismissal from arising and thus prevent a reference under s 20 of the Act, then no employee could ever avail itself to that provision because an employer can simply use the instrument of domestic inquiry. That cannot be the law. It was suggested that the employee could go to a court to sue for unfair demotion but why should that be the cause of action when the acts can constitute constructive dismissal. It must not be forgotten, as pointed out by the Court of Appeal in *Ang Beng Teik v Pan Global Textile Bhd* [1996] 3 MLJ 137 that workman must consider himself as having being dismissed without just cause or excuse before he can invoke s 20(1) and he cannot so consider himself if he had taken up the job in Kuala Lumpur. Once a workman considers a dismissal without just cause or excuse, it does not matter that

a domestic inquiry had preceded the events complained of as being a dismissal. Therefore I am unable to follow *Minolta Malaysia v Ng Siew Pheng*.

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[14] We are in agreement with the learned High Court judge. We wish to reiterate that in considering whether there is a constructive dismissal, the consideration is not whether there was any domestic inquiry but whether the employer was guilty of a breach of the contract of service going to the root of the contract or whether he has evinced an intention to no longer be bound by the contract (*Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1998] 1 MLJ 92).

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[15] In the present case, there is a clear breach of the respondent's contract of service by the appellant. Section 12.4.3 of the Personnel Policies & Regulations for Executive Termination of Service, applicable to the respondent, provides that 'unless it is a severe offence amounting to dishonesty or immorality, an employee shall be given an opportunity to correct his weakness before disciplinary action is taken against him'. But the respondent was not given such opportunity. Nowhere it is shown that section 12.4.3 of the Personnel Policies & Regulations for Executive Termination of Services was considered by the appellant before the disciplinary action was taken by the appellant. Nor was it stated that the offences committed by the respondent were severe offences, amounting to dishonesty or immorality. The punishment meted out reflects that the appellant did not consider the offences as severe amounting to dishonesty or immorality. Otherwise, the appellant would have imposed a more severe punishment such as terminating the respondent's service. Thus, the appellant by failing to provide prior counselling to the respondent before imposing the punishment of demotion, redesignation and transfer upon him, the appellant had breached the terms of the contract of employment with the respondent. The breach is a fundamental breach that goes to the root of the contract.

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[16] In any event, the Industrial Court, after going through the findings of the domestic inquiry and after having heard the evidence before it, had concluded that the appellant had failed to prove any of the four charges. The learned High Court judge, who had undertaken a careful evaluation of the findings of the Industrial Court, concurred with such findings. We were invited to reverse those findings on the ground that the Industrial Court had committed jurisdictional error in substituting its own findings for those of the domestic inquiry. We declined to do so as we are of the view that the Industrial Court is not precluded in substituting its own findings for those of the domestic inquiry. The findings of the domestic inquiry are not binding upon the Industrial Court which normally hears the matter afresh (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chua and another appeal* [1996] 1 MLJ 481; *Wong Yuen Hock v Hong Leong Assurance Sdn Bhd & Anor* [1995]

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A 2 MLJ 753; *Milan Auto Sdn Bhd v Wong See Yen* [1995] 3 MLJ 537). Thus, it is our judgment that the Industrial Court was right in holding that the respondent was constructively dismissed by the appellant without just cause or excuse.

B (ii) *Order of reinstatement*

C [17] The law on whether to grant reinstatement has been authoritatively stated by the Supreme Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789. In that case, the Supreme Court expounded the principle relating to the remedy of reinstatement and declared that the following factors are required to be taken into account when considering whether to order reinstatement. They are:

- (i) the past record of employee;
- D (ii) the nature of his alleged lapse;
- (iii) the conduct of the workman ie whether he had contributed to his own dismissal;
- E (iv) nature of relations between the employer and the employee;
- (v) the nature of duties performed by the employee; and
- (vi) the nature of industrial establishment.

F [18] In that case, the Supreme Court took into account the fact that the dismissed employee held a high ranking position (Food and Beverages Director) and ruled that reinstatement was not an appropriate remedy. Instead, the court granted compensation in lieu of reinstatement to the claimant. Similarly, in *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750, the Court of Appeal refused to reinstate on the basis that the employee was holding a high ranking and managerial position and that the circumstances in which the employee left showed that mutual trust was lacking. The same approach was adopted by the High Court in *JT International v Lau Thow Sin* [2006] 4 MLJ 251.

H [19] In the present case, the Industrial Court found that it was not practical for reason of industrial harmony to reinstate the respondent. The High Court was of a different view and ordered reinstatement. With utmost respect, we are unable to agree with the learned High Court judge. No doubt
I reinstatement is the usual remedy that is awarded in industrial law. But there may be circumstances where the reinstatement is inappropriate. The present case is such a case.

[20] The respondent held a reasonable high ranking position. He was the head of the appellant's branch in Tawau. On the facts of this case, mutual trust and confidence is lacking between the parties. There is no useful purpose, for reason of industrial harmony to thrust the respondent upon the appellant. More so in this case, the respondent had left the services of the appellant for five and a half years when the order of reinstatement was made by the High Court. Taking into account all the facts and circumstances of the case, we are of the view that the proper remedy in this case is compensation in lieu of reinstatement as ordered by the Industrial Court.

[21] For the above reasons we ordered that:

- (i) the appellant's appeal against the decision of the High Court in Application for Judicial Review No K25-15 of 2005 ordering the reinstatement of the respondent be allowed;
- (ii) the decision of the Industrial Court dated 18 May 2005 in not making an order of reinstatement in favour of the respondent and ordering the appellant to pay backwages of RM131,400 and compensation in lieu of reinstatement amounting to RM7,300 be affirmed;
- (iii) the appellant's appeal against the decision of the High Court in Application for Judicial Review No 25-16 of 2005 be dismissed;
- (iv) each party bears its own costs;
- (v) the deposit for this appeal refunded to the appellant.

Appeal was allowed in part.

Reported by Brendan Navin Siva